... BENEFIT GUARANTY CORPORATION,

Petitioner,

v.

... LTV STEEL COMPANY, INC., OFFICIAL ... CREDITORS OF LTV CORPORA- ... OF ... CREDITORS OF THE ... CREDITORS OF LTV ... OFFICIAL COMMITTEE ... BANCTEXAS DALLAS, N.A., ... NATIONAL BANK, CITI- ... AND WILLIAM W. SHAFFER,

Respondents.

... CERTIORARI TO THE UNITED STATES ... THE SECOND CIRCUIT

... THE LTV CORPORATION ... LTV STEEL COMPANY, INC.

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QUESTION PRESENTED

May a reviewing Court vacate and remand the PBGC's Notice of Restoration, based, in the agency's words, "on LTV's establishment of abusive follow-on plans," and "its financial improvements," PBGC's Petition for Certiorari at 11, where nothing in ERISA prohibits the establishment of "follow-on" plans, and the administrative record:

a. provided no support for the agency's conclusion that the plans established by LTV were abusive "follow-on plans";

b. established that the agency failed to consider the federal bankruptcy law and labor law policies affected by restoration;

c. established that the agency's "financial improvement" rationale had several fundamental gaps in reasoning;

d. established that the agency did not consider LTV Steel's status as a debtor in bankruptcy in assessing LTV Steel's "financial improvement";

e. established that the agency did not assess the possibility that the restored plans would have to be reterminated; and

f. established that the agency did not apprise LTV of the material on which it would base its decision, give LTV an adequate opportunity to offer contrary evidence, proceed in accordance with ascertainable standards nor provide a statement showing its reasoning?

LIST OF PARTIES

The parent corporation, subsidiaries, and affiliates of respondents The LTV Corporation and LTV Steel Company, Inc., are listed in Appendix B of the Opposition to Petition for a Writ of Certiorari of October 11, 1989.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Legislative History

Other Sources

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, AND WILLIAM W. SHAFFER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS THE LTV CORPORATION AND LTV STEEL COMPANY, INC.

STATUTES INVOLVED

This case involves sections 4002, 4041, 4042 and 4047 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1302, 1341, 1342 and 1347, see Pet. App. 133a-157a; the Bankruptcy Code, 11 U.S.C. §§ 1113, 1114; and the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), see Appendix A to the Opposition to Petition for a Writ of Certiorari.

PRELIMINARY STATEMENT

Contrary to the impression sought to be created by petitioner and *amicus*, this case is *not* about improper judicial construction of a federal agency's organic statute. Rather, this case is about a failure of administrative process with results contrary to federal reorganization and labor policies. That failure is demonstrated by the actual record before the Court. It is also demonstrated—and perhaps more pointedly—by the agency "discovering" and advancing, at each successive stage of appellate review, new justifications for its administrative action.

Petitioner Pension Benefit Guaranty Corporation (PBGC) was created by Congress to insure payment of retirement benefits. Yet for thirty months after taking administrative action the PBGC has dedicated its efforts to preventing thousands of workers and retirees from receiving benefits to which they are contractually entitled as a result of collective bargaining mandated by Section 7 of the Labor Management Relations Act and Section 1113 of the Bankruptcy Code. The agency's action to restore three LTV Steel pension plans cannot be supported by the minimal standards for informal adjudication. The action was taken pursuant to a vague "policy" of punishing employers who sign a collectively bargained agreement that alleviates some of the hardship caused by the involuntary termination of pension plans. By emphasizing to this Court this amorphous "policy" the agency and *amicus* ignore the conflict between that policy and other federal laws, the purpose of ERISA, the PBGC's own prior positions, and the actual administrative record here.

In an attempt to mask this failure of administrative process, petitioner and *amicus* now advance a new theory of "coinsurance", unsupported in the statute, legislative history, or the record. Then they raise the spectre of collusion between unions and employers to dump pension liabilities on the government. This explicit scare reference to the unrelated S&L problem totally confounds common sense, the unambiguous record in this case, and all known experience. Such belated and unfounded rationalizations cannot hide the agency's failure. As shown below, both the facts of this case and existing law fully support the rulings below.

STATEMENT OF THE CASE

The Financial Reasons for LTV's Bankruptcy Code Filing

On July 17, 1986 LTV, LTV Steel and its affiliates filed petitions for reorganization under Chapter 11 of the Bankruptcy Code. LTV Steel was the second largest steel company in the United States. It had been created by the merger of ailing steel companies — Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company and Republic Steel Corporation, Pet. App. 37a, with the expectation that through efficiency, LTV could survive the economic strains of the steel industry in the 1980s. *Id.* Unfortunately, continued economic pressures combined with foreign competition proved too formidable. Despite substantial concessions from its hourly employees represented by the United Steelworkers of America (USWA), Pet. App. 38a; JA 152, and other cost reductions, by summer 1986 LTV Steel was suffering record losses. Faced with impending defaults under credit agreements, no additional bank credit, and vanishing cash, LTV had no choice but to seek to reorganize under the Bankruptcy Code. JA 152

After the filings, LTV was permitted to continue to operate the businesses as debtors-in-possession for the benefit of its creditors and security holders. In the months after filing, LTV accumulated cash, a normal consequence of bankruptcy, since a debtor may not pay pre-petition debts until its assets have been marshalled and their distribution to all creditors assured. As a debtor-in-possession, LTV is attempting to maximize the value of its businesses and to accumulate cash so that all creditors, including its employees and the PBGC, may receive a fair recovery in a plan of reorganization.

The PBGC's Involuntary Termination of LTV Steel's Pension Plans

When it filed for reorganization LTV Steel had massive retirement obligations, including unfunded pension liabilities. Each steel company had brought its pension obligations to the merged entity.

To improve efficiency, LTV Steel had shut down extraneous facilities, thereby triggering retirement benefits to those laid off. Pet. App. 37a. As a result, LTV Steel's growing pension and retiree health liabilities rested on an ever shrinking base. By 1986 LTV Steel's 24,544 active workers supported 77,182 retirees and now 17,000 workers support 85,000 retirees. *Id.* The PBGC calculates that the total present value in 1986 of LTV Steel's unfunded liabilities for pension costs attributable to pre-Chapter 11 service exceeded $2 billion. *Id.*

Even before the bankruptcy filing, it was clear that LTV Steel could not remain a competitive steelmaker without restructuring its pension obligations. However, the hourly pension plans were established pursuant to collective bargaining agreements. As a matter of federal bankruptcy, labor and pension laws, LTV Steel could not voluntarily terminate its hourly pension plans without first bargaining with the USWA. 11 U.S.C. § 1113; 29 U.S.C. §§ 158(d), 159(a), 1341(a)(3) (1982 & Supp. IV 1986). The union adamantly opposed termination of the pension plans. Pet. App. 37a. At the same time, LTV Steel was prohibited as a matter of bankruptcy law from making contributions relating to pre-petition service to the pension plans. LTV Steel was stymied by these two legal mandates. Each month after the filing, LTV Steel's pension plans paid out $31 million in benefits but received no contributions for pre-petition service. As uneconomic facilities were shut down in the months after the bankruptcy filing, unfunded pension liabilities increased. Only involuntary termination by the PBGC could stop this escalating liability. JA 122.

By September, 1986 one plan — the Republic Retirement Plan — ran out of assets. The PBGC was compelled under the involuntary termination provisions of ERISA, 29 U.S.C. § 1342, to terminate that plan. JA 122. The PBGC never attempted to avoid this mandatory termination by moving to compel contributions; apparently the agency then accepted the principle that a debtor could not make contributions for benefits based on pre-petition service. On January 12, 1987, to "avoid an unreasonable deterioration of the Plans' financial condition or an unreasonable increase in the

liability of the PBGC's insurance funds," the PBGC petitioned to terminate involuntarily LTV Steel's three other pension plans. Pet. App. 42a. The PBGC terminated these plans even though it recognized that LTV Steel would accumulate "just over $1 billion by the end of 1988," because even that cash would be insufficient to "finance [both] a plan of reorganization and the ongoing [pension] Plans." JA 129. LTV consented to the terminations. Pet. App. 42a. The PBGC then filed claims exceeding $2 billion against each of the debtors. These claims, with those of all other creditors, will be paid pursuant to a plan of reorganization.

The USWA Suit and Threatened Strike Leading to the 1987 Interim Labor Agreement

Unlike those of many companies, LTV Steel's pension plans had been structured to provide not only pensions but also many other benefits, including payments to disabled workers, benefits for spouses of employees who die in active service, and supplements to workers who lost their jobs as a result of plant shutdowns and who did not yet qualify for Social Security benefits. Pet. App. 42a. The PBGC's involuntary plan terminations therefore caused severe hardship to both retirees and active workers. *Id.* For example, an employee who had lost his job as a result of a plant shutdown lost half his monthly income; an employee counting the days until he would be eligible for a thirty year pension lost the ability to obtain this retirement benefit; an employee disabled after the termination received no payments; and a surviving spouse of an active employee similarly lost all benefits. Pet. App. 42a-43a; JA 242-243. The PBGC's guaranty is limited to basic pension benefits.

The union did everything possible to oppose termination and alleviate the hardships imposed on its members. The union

appealed the terminations of the hourly plans, Pet. App. 7a,[1] and sued to enforce the pension obligations in the labor contract.[2] The USWA argued that under Section 1113 of the Bankruptcy Code the contract is enforceable against a debtor-in-possession, and the PBGC itself had argued to the Third Circuit that this contract right survives plan termination. *Murphy* v. *Heppenstall Co.*, 635 F.2d 233 (3rd Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982). Pet. App. 7a-8a; AR 694. The union backed its demands for hardship payments by threatening a strike which could have cost $100 million per month.[3] Pet. App. 8a, 43a-44a; JA 357.

Bargaining commenced. After weeks of intense and complicated negotiations, a tentative agreement was reached on May 13, 1987. Pet App. 8a, 44a. Then the local presidents rejected these terms.

1. The PBGC defended the terminations before the Court of Appeals, which on July 17, 1987 affirmed the involuntary termination orders. *Jones & Laughlin Hourly Pension Plan* v. *The LTV Corp.*, 824 F.2d 197 (2d Cir. 1987) and *Jones & Laughlin Retirement Plan* v. *The LTV Corp.*, 824 F.2d 202 (2d Cir. 1987).

2. The lawsuit is still pending and will be revived if the interim agreement which settled the action is found unlawful but the pension plans remain terminated.

3. At the very beginning of the LTV bankruptcy cases the USWA had struck LTV Steel's most important facility in response to LTV Steel's initial inability to pay retiree medical benefits. Pet. App. 43a-44a. To avoid irreparable harm to its reorganization prospects LTV Steel sought and obtained court authority to pay these benefits, *In re Chateaugay Corp.*, 64 B.R. 990 (S.D.N.Y. 1986), and Congress had unanimously passed a statute requiring full payment of retiree health benefits. *See* Pub. L. No. 99-591, 100 Stat. 3341, *amended by* Pub. L. No. 100-41, 101 Stat. 309 *and by* Pub. L. No. 100-99, 101 Stat. 716; *see also* Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified in part at 11 U.S.C. § 1114). The USWA had also struck the Wheeling-Pittsburgh Steel Company, another Chapter 11 debtor, for its failure to pay post-termination pension benefits, and USX Corporation, the nation's largest steel company. Pet. App. 43a-44a.

Id. The parties edged closer to a strike. Renewed bargaining produced a new contract, which the membership approved by a narrow vote. *Id.*; AR 1080.

The record here is far different from the hypothetical spectre advanced by the PBGC of unions "realigning" their interests with employers to dump pension liabilities on the Government. LTV Steel negotiated interim benefits only under the twin threats of a strong lawsuit and a devastating strike. Even then, LTV Steel was able to obtain significant concessions that offset the cost, but only after this resolution was first rejected by the local union officers.

The agreement is expressly designed as an interim arrangement to govern the parties' relationship during the period of reorganization. Pet. App. 8a, 44a; JA 154-155. Negotiation of a labor agreement for the period after bankruptcy will occur as a plan of reorganization is negotiated with all of LTV Steel's creditors. JA 155. The interim agreement provides that it will terminate if the hardship payments are found illegal. Pet. App. 44a; JA 155.

The agreement represents an effort by both LTV Steel and the USWA to meet the multiple challenges of this reorganization. The USWA made significant concessions which generate annual savings to LTV Steel of approximately $50 million. Pet. App. 45a. In return, LTV Steel agreed to new programs designed to relieve the hardships caused by the involuntary terminations of the pension plans. *Id.* The new programs for hourly employees have a total annual cost of about $70 million, gradually decreasing over time. *Id.*; JA 244-245. With savings from the concessions, LTV Steel's annual net cost is $20 million. Pet. App. 45a. LTV also established a comparable program to replace pension losses for salaried retirees. JA 161-162.

The programs implemented in the interim collective bargaining agreement (the "CBA Plans") include revised pension benefits for both active workers and retirees, as well as disability payments, surviving spouse benefits and plant shutdown protection. Pet. App. 45a; JA 157-160. The new programs developed in collective

bargaining differ substantially from the benefits provided under the terminated plans.[4]

4. The differences between the pre-termination plans and the post-termination programs are many. First, the basic plan for active employees is a defined contribution rather than a defined benefit plan. *Compare* JA 156, 214, 217-218, 220, AR 475 *with* AR 1180-1186, 1327-1340, 1435-1446. Monthly contributions to individual participants' accounts are based on service rendered after the effective date of the plan. JA 214. An employee's pre-termination service is relevant only in determining whether the Company's contribution is to be based on an hourly amount or a percent of earnings, or is to be increased by an additional fifty percent. JA 215-216, AR 477-479.

The new pension plan is not protected by the PBGC insurance program. *See* ERISA § 4021(b)(1), 29 U.S.C. § 1321(b)(1). At retirement a participant in a defined contribution plan receives only the benefits that can be purchased by the amount that has accumulated in his account. JA 220-221 In contrast, a participant in a defined benefit plan is entitled to a predetermined monthly benefit payable for his lifetime. AR 1180-1186, 1327-1340, 1435-1446.

The other new programs established as part of the interim agreement—the individual account trusts ("IAT"), the lump sum severance benefits, the extended supplemental unemployment benefit ("SUB"), the pre-retirement surviving spouse benefit and the disability income benefit ("DIB")—are also significantly different from the terminated plans. None of these programs is guaranteed by the PBGC. The IAT is not tax-qualified or tax-favored. Benefits are provided through a variety of sources, while all benefits under the terminated plans were provided under the plans; the new plans contain certain more restrictive age and/or service eligibility requirements; and length of service does not necessarily increase the amount of some benefits. The extended SUB and DIB are provided through trust funds which qualify as welfare funds under Internal Revenue Code § 501. JA 202, 208. Pre-retirement surviving spouse benefits are paid through an insurance company either through the Company's payment of premiums or the purchase of lifetime annuities. JA 178-179. IAT and lump sum severance benefits are paid as needed directly from corporate assets or a trust fund. JA 194, 210. The age and/or service requirements for various benefits provided under the IAT are more restrictive than were pre-termination requirements; *compare, e.g.*, JA 184-189 *with* AR 1178-1180, 1329-1345, 1429-1434; the amount of many benefits under the IAT, DIB, surviving spouse, and extended SUB plans is no longer increased by length of service; and there are significant differences in benefit amounts. *Compare, e.g.*, JA 177, 194, 198-201, 205, AR 477-479, 487-488 *with* AR 1181-1186, 1329-1340, 1435-1446.

After the collective bargaining agreement was approved by the local union presidents, the PBGC declared that aspects of the agreement, never specified, violated a PBGC "policy", never delineated, against post-termination benefits and therefore was abusive. LTV, the PBGC and the USWA held several meetings in July 1987 in an effort to clarify and resolve the PBGC's objections to the proposed agreement. Pet. App. 49a-50a. The validity of the post-termination programs was the only matter discussed; LTV Steel's financial status was not mentioned.

Bankruptcy Court Approval of the 1987 Interim Agreement

LTV Steel, with the support of its major creditor constituencies and the USWA, promptly sought approval of the interim labor contract from the Bankruptcy Court. At the July 16, 1987 hearing, LTV's witnesses testified without contradiction that the interim agreement was necessary to avoid a crippling strike and to permit LTV and LTV Steel to reorganize. Pet. App. 45a. The financial advisor to the Creditors' Committee, called by the PBGC, testified that he did not believe that a better agreement could have been reached, AR 554; that LTV Steel would nevertheless have difficulty surviving, AR 546-548; but that the "bet the company" risk of a strike was unacceptable. JA 258. Only the PBGC offered testimony opposing the contract. The Bankruptcy Court approved the interim agreement as necessary for the ongoing reorganization. JA 259.

> "Based upon the complete record before me today, including all filed papers, it has become abundantly clear that this Court may and should utilize its equitable power to authorize the terms and payments contemplated by the agreements as they are clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 Debtor." Pet. App. 46a; JA 260.

The PBGC Abandons Appeal and Resorts to Perfunctory Administrative Restoration of the Plans.

Eight times, the PBGC's claim of "ERISA abuse" was heard and rejected in the Bankruptcy Court, in the District Court and in the Court of Appeals as the PBGC sought to stop approval and implementation of the agreement. Pet. App. 46a. The PBGC's appeal of the bankruptcy order approving the agreement would have resulted in complete vindication of its supposed policy had the PBGC been successful.

Yet, the PBGC chose to abandon the appeal and to achieve its goal through a charade of informal adjudication. The PBGC Board had not met in eight years. Now, it held a perfunctory fifteen minute telephone meeting, AR 598, and gave blanket approval to any restoration action the PBGC Executive Director might take. Pet. App. 49a. The Executive Director testified that she reviewed what she described as a "pile" of documents, J.A.Ct.Ap. 1035-1036, which subsequently became the entire administrative record. The Executive Director then sent LTV the first Notice of Restoration ever issued by the PBGC. Pet. App. 182a. The Notice restored three of the four terminated plans. It failed to explain why the fourth, to which the same "abuse" theory and claim of changed financial circumstances could be applied, was not restored. Pet. App. 125a n.44.[5]

5. The PBGC now states for the first time that the fourth plan was not restored because its assets were exhausted. PBGC Br. at 37 n.23. In the administrative record the agency stated, however, that the fourth plan was not restored because the agency expected to recover in full on its claim for the plan. JA 320.

In fact, ERISA compels termination where a plan's liquid assets are exhausted. 29 U.S.C. § 1342(a). In the three years since the pension plan terminations, benefits have been paid to retirees from the three plans the agency seeks to restore at a rate of approximately $26 million per month. At least one, the J&L Hourly Plan, is now out of assets. The other plans will soon exhaust their assets.

The PBGC cited three bases for the administrative action of restoring the plans: (1) LTV Steel's "abuse" of ERISA in establishing the post-termination programs negotiated with the USWA and approved by the Bankruptcy Court as necessary for reorganization; (2) "LTV Steel's improved financial circumstances"; and (3) "LTV Steel's demonstrated willingness to fund employee retirement arrangements." Pet. App. 182a. No further explanation or analysis was set forth in the Notice.

Since then, when called upon to explain its action the PBGC has abandoned on appeal grounds for its action,[6] asserted on appeal justifications never actually considered by it, and attempted to substitute bulk mass for considered analysis. What the administrative record reveals, at best, is a haphazard process of inadequate factual development and faulty analysis, as the courts below found. At worst it is governmental action for an undisclosed purpose[7] sought to be justified by *post hoc*, unfounded theories.

While the PBGC says the record is voluminous, in fact the PBGC relies upon fewer than ten pages of the administrative record to explain its administrative action. The basis for the PBGC's finding of "abuse" is set forth in three conclusory paragraphs of one PBGC affidavit prepared after restoration. AR 224-225; *see* Pet. App. 108a. Three pages of another document record what the PBGC claims is a financial "analysis", a rudimentary paper purporting to compare a projection of LTV Steel's cash flow and minimum cash

6. The PBGC never demonstrated the legal or factual relevance of "willingness," and before the Court of Appeals it abandoned any reliance on this premise for restoration. Pet. App. 25a.

7. Restoring plans which have no assets is a futile act requiring prompt retermination. The law has changed since the original termination, and the liabilities of the plans have increased. If the PBGC can restore and immediately reterminate these plans, the PBGC would succeed in manipulating the termination/restoration process to increase its bankruptcy claim from $2 billion to more than $3 billion, to the detriment of other creditors.

needed to fund the pension plans, if LTV had no other obligations. AR 12-14; *see* Pet. App. 114a. Notable is the absence from the administrative record of any agency consideration of future plant shutdowns. This factor, which the agency now claims was "central to its decision to terminate the Plans," PBGC Br. at 12, was raised by the agency as a factor in restoration for the first time in its appeal to the Second Circuit.[8]

The PBGC's administrative record shows that both the terminations and restoration were based in essence on the same evidence — the same two-year business plan, Pet. App. 112a-113a, even though the PBGC knew that a new seven-year business plan would be made available within days. Pet. App. 128a n.46. With reference to that two year business plan, the PBGC staff stated at the first meeting to discuss *restoration* that at the time of *termination* a "financial analysis presented to the group based on LTV's most optimistic projections indicated that LTV could not make the required contributions to meet the minimum funding requirements". Pet. App. 113a n.37. The only additional information considered was the debtor's performance and its expected accumulation

8. While the PBGC contends that estimated shutdown liabilities of $300 to $700 million were anticipated at the time of termination but no longer at the time of restoration, PBGC Br. at 9, 12, in fact all of the shutdowns anticipated at LTV Steel's non-operating facilities had occurred prior to termination. JA 134, 135. The record shows that in December 1986 no shutdowns were scheduled for 1987, and only one partial shutdown (which did not occur) was assumed, though not scheduled, for mid-1988. JA 41. LTV's 1986 Form 10-K does not describe any anticipated shutdowns. JA 132-134. Nor do the Forms 10-Q of either LTV or LTV Steel for the first quarter of 1987. JA 143-146. No threat of major additional shutdown liability loomed over the PBGC at the time of termination. Therefore, the belated claim that such a threat suddenly vanished in mid-1987 is unsupportable. While the PBGC cites as a revelation LTV Steel's July testimony that no major shutdowns were anticipated, JA 255-256, this testimony is consistent with the facts at the time of involuntary termination as reflected in the administrative record. JA 41.

of cash while in Chapter 11 in the first five months of 1987. Pet. App. 113a.

The PBGC's analysis assumes that all of LTV Steel's cash, accumulated as a result of the debtor's inability as a matter of bankruptcy law to pay its creditors, and all of its future cash flow, should be applied to fund its pension plans. This "analysis" ignored LTV Steel's obligations to its other creditors under the Bankruptcy Code.[9] The PBGC's financial analysis also made unexplained assumptions, including the extraordinary proposition that the union's $50 million in concessions would stay in place even if the interim labor agreement were voided by restoration, and that IRS funding waivers that had previously been denied would be granted. At the same time, the PBGC failed completely to consider the effect of bankruptcy or labor law on its restoration decision, even though those important federal policies were at odds with the agency's use of its restoration authority here.

Decisions Below

In the District Court the PBGC moved for summary judgment to enforce its administrative restoration. On July 22, 1988, the District Court vacated the Notice of Restoration. *In re Chateaugay Corp.*, 87 B.R. 779 (S.D.N.Y. 1988), Pet. App. 28a. The PBGC appealed, and the Court of Appeals for the Second Circuit Court affirmed, finding that "the intentions of ERISA, bankruptcy and labor law belie . . . [the] assertion" that the agency could base restoration on abuse. Pet. App. 17a. The Court also held, "Even when we examine the factors upon which PBGC did base its decision, we find no

9. In order for LTV Steel to reorganize and avoid liquidation it must pay creditors under a plan of reorganization at least what they would receive in a Chapter 7 liquidation. *See* 11 U.S.C. § 1129(a)(7). If LTV Steel were forced to put all of its cash into the pension plans, it could not propose a plan of reorganization which would meet the "best interest of creditors" test, and its creditors would force liquidation under Chapter 7 in order to maximize their recovery.

support in the administrative record for the conclusion reached," Pet. App. 17a, specifically finding that:

(a) the PBGC had no support in the administrative record for its conclusion that the CBA Plans were abusive "follow-on" plans. Pet. App. 19a.

(b) the PBGC "financial improvement" rationale was based on "fundamental, yet unexplained and unexamined assumptions." Pet. App. 22a.

(c) the PBGC "did not effectively assess the impact that LTV's status as a debtor in Chapter 11 reorganization had on its financial condition." Pet. App. 23a.

(d) "[N]owhere in the administrative record is there any evidence that PBGC assessed the possibility that the Plans would have to be re-terminated." Pet. App. 25a.

(e) "PBGC neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards . . . nor provided a statement showing its reasoning in applying those standards." Pet. App. 26a.

SUMMARY OF ARGUMENT

The holdings of the District Court and the Court of Appeals vacating the notice of restoration and remanding the matter to the agency are compelled by settled principles of statutory interpretation and the basic requirements of judicial review of administrative action.

1. The interim agreements that the agency labels "abusive" were the product of LTV's obligations under bankruptcy law and labor law. This Court has stressed the importance of balancing the multiple, competing considerations within bankruptcy reorganization, and Congress has mandated that the collective bargaining process and labor contracts be given a special place in the reorganization process. Here, the negotiation of retirement benefits is a mandatory subject of bargaining, and nothing in ERISA authorizes the PBGC to invalidate a labor contract incorporating such terms and conditions of employment. The agency's abuse policy has no basis in law. At minimum, the agency's failure here even to consider the

significant federal policies of other statutes which directly led to the development and bankruptcy court approval of the interim agreement renders its restoration action arbitrary and capricious.

2. The agency's abuse policy is fundamentally inconsistent with the agency's duties under ERISA. The central purpose of ERISA is to ensure that employees obtain the full benefits to which they are contractually entitled. The agency has recognized employees' contractual right after termination to recover non-guaranteed benefits directly from the employer. Moreover, Congress has specifically endorsed employers' payments of non-guaranteed benefits after termination by amendments to ERISA that expressly provide for the collection and distribution of amounts in excess of guaranteed benefits.

3. In any event, the agency's asserted policy against abusive follow-on plans is logically irrelevant to restoration. Financial improvement is a *necessary* condition for restoration — since to "restore" plans to an entity that cannot afford them would be a meaningless exercise leading to immediate retermination — and a *sufficient* condition for restoration — in that the agency need find nothing other than financial improvement to justify restoration.

4. The agency's determination that the financial condition of LTV Steel had improved such that LTV Steel could afford the previously terminated plans was arbitrary and capricious. Perhaps because this ground for restoration was an afterthought, the agency did not consider the possibility that the plans, if restored, would have to be reterminated; failed to consider that LTV was in bankruptcy and unfunded liabilities relating to pre-petition service gave rise to pre-petition claims which could be paid, with others of equal status, only at the time of confirmation of a plan of reorganization; did not consider that any apparent "improvement" in cash was due to the expected accumulation of cash in bankruptcy; articulated no reviewable standard of financial improvement; and based its financial improvement conclusion on "fundamental, yet unexplained and unexamined assumptions" concerning the company's ability to modify ERISA funding standards and to retain the benefit of concessions negotiated in exchange for the follow-on plans. Pet. App. 22a.

5. The Court of Appeals' criticism of the procedure by which the agency reached its restoration decision raises no issue under *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978). To fulfill its obligations under the Administrative Procedure Act, and consistent with the common law of informal adjudication, the Court was authorized to ensure a process consistent with fundamental fairness and the existence of a record adequate to permit judicial review of the agency's decision. Since no procedures for informal adjudication are articulated in the Administrative Procedure Act or in ERISA, a court is permitted to draw on common law to suggest the basic elements of fair process. The discussion of PBGC procedures should be regarded as part of the Court's examination of the PBGC's "failure to develop a complete, reviewable record," Pet. App. 123a, as required by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416-417 (1971).

ARGUMENT

POINT I

The Agency Acted Outside its Statutory Authority in Basing Restoration on "Abuse"

The PBGC acted outside its statutory authority in using restoration to enforce an asserted policy against abusive follow-on plans. The agency cannot declare the provision of interim benefits abusive without taking account of the federal bankruptcy and labor law that directly led to the interim agreement. It is this Court's responsibility to accommodate ERISA's policies on restoration with the competing considerations of other federal laws. The searching inquiry required in review of informal adjudication demonstrates that the PBGC's "abuse" policy has no legal foundation. Even if it is valid in some circumstances, the agency's failure to consider the relevant factors in this case compels the conclusion that its action here was arbitrary and capricious.

Even without looking beyond the agency's enabling statute, the agency's policy of punishing employers for attempting to mitigate the hardships imposed on employees and retirees by termination violates ERISA. Moreover, even if follow-on plans are found to be unlawful, the logical remedy is to invalidate them, not to restore plans which LTV Steel cannot afford and which would have to be reterminated promptly. Follow-on abuse is logically irrelevant to the restoration decision.

Judicial review of this category of agency action is governed by the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of 5 U.S.C. §706(2)(A) ("APA"). Even in informal adjudication, the court must engage in a "thorough, probing, in-depth" review to determine whether the agency's decision-making process was reasoned, took into account all relevant policies and information, and reached a result consistent with congressional intent. *Overton Park*, 401 U.S. 402 at 415-417; *Sierra Club* v. *United States Army Corps of Eng'rs*, 772 F.2d 1043, 1051 (2d Cir. 1985). A reviewing court must determine whether the agency's stated explanation for its action is "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), *quoting Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Belland* v. *PBGC*, 726 F.2d 839, 845 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984). This searching inquiry is designed to ensure that all government agencies respect the limits of their enabling law and the requirements of fair process whenever they adjudicate the rights or interests of affected parties.

The PBGC, as any agency, is obliged to give consideration to competing policies if its actions implicate national policy beyond its area of expertise. Any possible conflict must be recognized, and any agency action must be narrowly drawn to accommodate such national policies. *See, e.g., Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 172-174 (1962); *LaRose* v. *FCC*, 494 F.2d 1145, 1146 n.2, 1147-50 (D.C. Cir. 1974).

ERISA Section 4047, 29 U.S.C. § 1347, requires the agency to determine whether restoration would be "appropriate and consistent with its duties" under Title IV of ERISA. This minimal requirement, an inherent limitation on any agency's action, plainly cannot support the PBGC's claim that it can blithely precipitate conflicts with major labor law and bankruptcy policies. Moreover, the restoration decision here is based on an asserted agency policy that is fundamentally contrary to the agency's purpose and duties under ERISA. The restoration notice must remain vacated.

A. The Agency Could Not Declare the Interim Benefits "Abusive" Without Considering the Major Federal Policies that Led to Their Creation

In restoring three of the four terminated plans the PBGC ignored both federal bankruptcy and labor law. Both of these bodies of federal law serve important national goals recognized by Congress and this Court. Particularly given the imprecise provisions of Section 4047 of ERISA, the PBGC was obliged to heed these laws, and accommodate the way they intersect with ERISA, when deciding to restore three terminated pension plans.

Under the Bankruptcy Code, the reorganization process is intended to restore a sick company to health by freezing individual creditor demands until a plan of reorganization can be formulated. In its design of Chapter 11, Congress has mandated that all creditor claims of equal priority be treated equally. If any single creditor is permitted to contravene this design by leapfrogging the rest, the entire process will fail. Reorganizations are favored in the statutory scheme. "The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders .... If the business can extend or reduce its debts, it often can be returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets." H.R. Rep. No. 595, 95th Cong., 2d Sess. 220, *reprinted in* 1978 U.S. Code Cong. &

Admin. News 5963, 6179. This Court has long recognized the special nature of reorganization proceedings, and the protection to be given to the reorganization process. *Continental Illinois Nat'l Bank & Trust Co.*, v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648, 676 (1935).

The two central policies served by reorganization are the fresh start given to a debtor and the fair and equitable distribution of the debtor's assets to similarly situated creditors. *Continental Illinois, 294 U.S. 648 (1935); see also NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 528 (1984); *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 202 (1983); *In re A&B Heating & Air Conditioning*, 823 F.2d 462, 465 (11th Cir. 1987), *vacated on other grounds*, 108 S.Ct. 1724 (1988).[10] To ensure that the policy of equitable treatment is served, the "multiple, competing considerations underlying a Chapter 11 reorganization" may not be subordinated to one issue or policy. *Bildisco*, 465 U.S. at 525; *Whiting Pools*, 462 U.S. at 209; *see also In re A&B Heating and Air Conditioning*, 823 F.2d 823 F.2d 462, 465 (11th Cir. 1987), *vacated on other grounds, 108 S.Ct. 1724 (1988); In re Century Brass Products, Inc.*, 795 F.2d 265, 274-75 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986).

By exercising economic leverage at the bargaining table with a debtor-in-possession, a labor organization may have a disproportionate advantage in the reorganization process. However, following this Court's ruling that a labor contract was subject to rejection by the bankruptcy court, Congress enhanced the legal protections for collective bargaining agreements because the bargaining process is a cornerstone of national labor policy. 11 U.S.C. § 1113.[11]

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10. When the Bankruptcy Court granted LTV's application to approve the interim labor agreement, it found it "abundantly clear that this Court may and should utilize its equitable power to authorize . . . the agreements as they are clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 Debtor." AR 622.

11. "A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce.... Central to achievement of this purpose is the pro-

Both the weight ascribed by the Court to the fundamental principles of reorganization and the special recognition given labor contracts and the collective bargaining process are illustrated by the *Bildisco* case and its legislative aftermath. In *Bildisco*, this Court had recognized the "special nature of a collective-bargaining contract," but had ruled that collective bargaining agreements were not to be treated in a reorganization case differently from other contracts. 465 U.S. at 524. In response, Congress enacted Section 1113, which imports fundamental principles of labor law into the Bankruptcy Code. Section 1113 is intended to encourage the collective bargaining process. *Century Brass*, 795 F.2d at 273. A debtor must negotiate in good faith over any proposed modification of a labor contract. *Truck Drivers Local 807* v. *Carey Transp. Inc.*, 816 F.2d 82, 89 (2d Cir. 1987). Mandatory subjects of bargaining include "pension and insurance benefits for active employees," *Allied Chem. & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971), and "such 'non wage' benefits as . . . group health insurance." *Connecticut Light & Power Co.* v. *NLRB*, 476 F.2d 1079, 1081 (2d Cir. 1973). Under Section 1113, retiree benefits are also a subject of mandatory bargaining during a reorganization proceeding. *Century Brass*, 795 F.2d at 274.

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motion of collective bargaining as a method of defusing and channeling conflict between labor and management." *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981). "The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements . . . between unions and employers . . . . Enforcement of the obligation to bargain collectively is crucial to the statutory scheme." *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952); *see Bildisco*, 465 U.S. at 526; *Int'l Ass'n of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). At the core of the obligation to bargain collectively is the duty to bargain over mandatory subjects of bargaining, the areas in which "neither party is legally obligated to yield." *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

However, Congress maintained the structural goals of reorganization in Section 1113. "[A]ll creditors, the debtor and all of the affected parties are treated fairly and equitably." 11 U.S.C. § 1113(b)(1)(A). "The purpose of this provision . . . 'is to spread the burden of saving the company to every constituency while ensuring that all sacrifice to a similar degree'." *Carey Transp.*, 816 F.2d at 90, *quoting Century Brass*, 795 F.2d at 273. *See generally Nathanson* v. *NLRB*, 344 U.S. 25, 28 (1952) ("The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act"); *NLRB* v. *Martin Arsham Sewing Co.*, 873 F.2d 884, 886-87 (6th Cir. 1989) ("The equitable distribution principles of the Bankruptcy Code apply to the NLRB notwithstanding the Board's broad powers to effectuate the public purposes of the NLRA").

Here, had the PBGC not involuntarily terminated LTV Steel's pension plans, LTV Steel would have attempted to use Section 1113 to modify its 1986 agreement and to commence voluntary termination of its pension plans. However, the obstacles were considerable. The USWA did not support termination, and use of Section 1113 to reject the labor contract, even if the economic test were satisfied, created the risk of a crippling strike. That risk was crystallized after the PBGC terminated the plans, and the USWA brought suit, contending that the PBGC's involuntary termination abrogated LTV Steel's 1986 labor agreement in violation of Section 1113. A strike was narrowly averted by the interim agreement, as the Bankruptcy Court found when approving it.

The PBGC contends that it properly ignored this entire process, mandated by two bodies of federal law, because Section 4047 requires that before the agency restores a plan it need only determine that restoration is internally consistent with its enabling act. PBGC Br. at 40. This requirement (which is not even met in this case, see *infra* at 23-32) articulates an inherent limitation upon every agency action, *see, e.g.*, *Bureau of Alcohol, Tobacco &*

Firearms v. *FLRA*, 464 U.S. 89, 97 (1983). The agency cannot transform this self-evident proposition into the plainly preposterous one that it is entitled to deference when it declares that its actions pose no conflict with other federal policies. The agency's declaration that its action does not conflict with the major federal statutes that led to the provision of interim benefits is entitled to no deference. *See, e.g., Ohio Power Co.* v. *Federal Energy Regulatory Comm'n*, 880 F.2d 1400, 1405 (D.C. Cir. 1989) ("When an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is entitled to no deference"); *Colorado Nurses Ass'n* v. *FLRA*, 851 F.2d 1486, 1488 (D.C. Cir. 1988) ("Because the FLRA's decision required it to reconcile its organic statute with a statute not within its area of expertise, we owe it no particular deference");[12] *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 808 (3rd Cir. 1988); *Parola* v. *Weinberger*, 848 F.2d 956, 959 (9th Cir. 1988); *Whalesy* v. *Schweiker*, 663 F.2d 871, 873 (9th Cir. 1981). This Court must undertake to accommodate the agency's policy with federal labor law and bankruptcy law. That accommodation must lead to the conclusion that restoration cannot be based on an interim agreement that was the direct product of these two major federal policies. At the very least the agency's failure even to consider these two bodies of federal law renders its action arbitrary and capricious.

12. This principle has been stated repeatedly in the context of judicial review of decisions of the Federal Labor Relations Authority. *See e.g., Fort Knox Dependent Schools* v. *FLRA*, 875 F.2d 1179, 1181 (6th Cir. 1989); *Illinois Nat'l Guard* v. FLRA, 854 F.2d 1396, 1400 (D.C. Cir. 1988); *United States Dep't of Navy* v. *FLRA*, 840 F.2d 1131, 1134 (3d Cir. 1988); *Department of Treasury* v. *FLRA*, 838 F.2d 1341, 1342 (D.C. Cir. 1988); *Department of Treasury* v. *FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988); *Department of Navy* v. *FLRA*, 836 F.2d 1409, 1410 (3d Cir. 1988); *Veterans Admin. Medical Center* v. *FLRA*, 732 F.2d 1128, 1132 (2d Cir. 1984).

The agency's contention that it is not obligated to consider "countless policies . . . arguably relevant" to its actions, PBGC Br. at 41, is a diversion. Neither the District Court nor the Court of Appeals imposed such an obligation. Rather, the agency is required to consider the major factors leading to the particular agreement at issue; the PBGC's contrary position blatantly violates this Court's expression of the importance of balancing "multiple, competing considerations" within Chapter 11, *Bildisco*, 465 U.S. at 525, the policy of fair and equitable treatment of creditors which that expression serves, and Congress' expressed mandate that the collective bargaining process and the goals of national labor policy be given a special place in the Chapter 11 process.

B. The Agency's "Abuse" Policy Is Fundamentally at Odds with ERISA

Even if we focus inquiry on the agency's enabling statute, the PBGC's "abuse" policy is fundamentally contrary to its purposes and duties under ERISA. The agency cannot enforce a policy specifically designed to deprive employees and retirees of contractually promised pension benefits.

1. The Bedrock Purpose of ERISA Is the Protection of Full Pension Benefits

The basic purpose of ERISA is to protect the pensions contractually promised to millions of employees, and to ensure that "pension expectations not be eliminated by business or pension plan failure." 120 Cong. Rec. 4446 (1974). ERISA was enacted to address "the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives." S. Rep. No. 127, 93d Cong., 2d Sess. 1, *reprinted in*, 1974 U.S. Code Cong. & Admin. News 4838. *See*, 29 U.S.C. § 1001b(c)(3) (Supp. IV 1986) ("It is hereby declared to be the policy of this title . . . to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full

benefits . . . .") As this Court has observed, "[o]ne of Congress' central purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated . . . . Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — he actually will receive it." *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 374 (1980).

Consistent with the goal of ERISA, employees whose pension plan had been involuntarily terminated may sue an employer directly for the difference between the payments guaranteed by the PBGC and those provided in the labor contract negotiated between the employer and the union representing employees. *Heppenstall*. In *Heppenstall* the PBGC as *amicus* supported the employees' right to recover directly from the employer, arguing that ERISA did not void existing pension contracts and did not impose a cap on the payment of non-guaranteed benefits. "[A]n employer's agreement to provide greater benefits is not inconsistent with Title IV of ERISA." PBGC Amicus Br. in *Heppenstall*, p. 3.[13]

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13. After the agency involuntarily terminated the LTV Steel plans, the USWA initiated a *Heppenstall* lawsuit against LTV Steel for the full amount of benefits set forth in the pension agreements. The pension agreements had provided the specific contractual guarantee that "[a]ny benefit properly payable pursuant to this agreement shall continue to be payable, notwithstanding the termination . . . of this Agreement." AR 1478. The interim agreement was entered into in settlement of this lawsuit. JA 166-167. The lawsuit will be revived if the new agreement is found illegal.

The Solicitor General's discussion of *Heppenstall*, U.S. Br. at 15 n.8, conveys the incorrect impression that the agency has recognized employees' contractual rights to non-guaranteed benefits only where the agency has recovered the full amount of the unfunded benefits it has guaranteed. In fact, at the time of the *Heppenstall* decision, ERISA limited the amount of unfunded benefits recoverable by the PBGC to 30% of the employer's net worth. 29 U.S.C. § 1362(b)(2). The *Heppenstall* court observed:

Finally, not only does ERISA have an overarching purpose to protect full pension benefits, Congress also has specifically endorsed employers' payments of non-guaranteed benefits after termination. In the Single Employer Pension Plan Amendements Act of 1986 ("SEPPAA"), its 1986 amendment of ERISA, Pub. L. No. 99-272, 100 Stat. 237 (1986), Congress expressly provided for collection and distribution of amounts in excess of PBGC guaranteed benefits. The claim of the Section 4049 trustee for non-guaranteed benefits has equal standing in Chapter 11 with the PBGC claims for unfunded liability attributed to pre-petition service. ERISA Section 4049, 29 U.S.C. § 1349 (Supp. IV 1986).[14] Moreover, in the 1987 amendments, Pension Protection Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987) ("PPA"), which were not in effect at the

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"It is not inconsistent with the statutory scheme [of ERISA] to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself. *While the effect of permitting that additional recovery may reduce the employer's net worth, and thus decrease the amount the PBGC may recover from the employer, the PBGC in its amicus brief to this court has taken a position supporting the employees' right to recover directly from the employer.*" *Heppenstall*, 635 F.2d at 239 (emphasis supplied).

The Solicitor General's discussion might also convey the incorrect impression that Congress has endorsed the concept that employees' contractual right to recover from the employer non-guaranteed benefits somehow does not arise unless the agency has first received the full amount of unfunded benefits it has guaranteed. The 1987 amendment cited by the Solicitor General, 29 U.S.C. § 1322(c) (Supp. V 1987), in fact does the opposite. It requires the PBGC to pay some non-guaranteed benefits even if it has *not* recovered the full amount of unfunded guaranteed benefits.

14. In 1987, the PPA repealed Section 4049 in favor of a broader mandate that the PBGC directly collect 100% of all pension benefits, guaranteed or not, and distribute a proportionate amount to beneficiaries. 29 U.S.C. § 1362(b)(1)(A) (West Supp. 1988).

time of the termination of the LTV Steel plans, Congress provided that the PBGC allocate a portion of its recovery to employees as non-guaranteed benefits even if the agency has not recovered the full amount of unfunded guaranteed benefits. 29 U.S.C. § 1322(c) (Supp. V 1987).

2. The Agency Cannot Use Restoration to Enforce a Policy Fundamentally Contrary to its Duties Under ERISA

The effect of the agency's "abuse" policy is to prohibit an employer from mitigating the hardship of termination.[15] Without regard to the employer's financial condition, the agency will use restoration to punish the employer who eases the hardship caused by the loss of non-guaranteed benefits by implementing benefit plans, even though the PBGC would have no interest in a wage increase, additional vacation time, or increased medical benefits implemented for the same purpose.[16] PBGC Br. at 8; U.S. Br. at 24-25. This policy is irrational. It is also contrary to the PBGC's basic duties under ERISA. As a result, this restoration decision was arbitrary and capricious. "The judiciary is the final authority on

15. The agency has conceded that it does not object to the establishment of new plans that provide retirement benefits for post-termination service. PBGC Br. at 7 n.8. Thus this aspect of the CBA plans apparently does not run afoul of the agency's abuse policy.

16. The agency strains to avoid a straightforward description of its policy by stating that, if employees receive a significant portion of non-guaranteed benefits, then the plan has not really been terminated. PBGC Br. at 29. This statement is not tenable. The entire structure of ERISA bases termination on the financial condition of the plan and the employer. *See* 29 U.S.C. §§ 1341, 1342; *supra* Point I.A. As the agency has conceded, the Republic Retirement Plan remains terminated because it cannot afford to pay benefits when due — even though the agency's entire follow-on plan argument is equally applicable to the Republic Retirement Plan, whose participants are receiving the same hardship payments.

issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984). "[T]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress. . . . Accordingly, while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act . . . they must not rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 97, *quoting American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 318 (1965), and *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965) (internal quotations omitted).

Before this Court (but nowhere in the administrative record)[17] the agency attempts to bolster its abuse policy by contending that, unless it can prevent employers from easing the pain of termination, employers and employees will conspire to terminate plans. PBGC Br. at 28-29.

There is no evidence — in the record of this case or anywhere else — to suggest that unions are prepared to modify their uniform hostility to plan termination. The USWA did all in its power to oppose termination of the LTV Steel plans. It appealed the terminations of the hourly plans and initiated a lawsuit against LTV Steel for the provision of full pension benefits. The USWA also

17. *See* Pet. App. 109a-110a (District Court, referring to argument in PBGC brief that "it could become routine for employers to file for bankruptcy primarily to escape their pension benefit obligations," observed that the argument "is unsupported by any facts or even expert opinion in the Record, and the Record does not contain any analysis of the extent of any such threat, if realized").

threatened a crippling strike against LTV Steel. An agency cannot support a policy with hypothetical "facts" that do not exist in any experience. "It is an axiom of administrative law that an agency's explanation of the basis for its decision must include 'a rational connection between the facts found and the choice made.' . . . Agency deference has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for the administrative action." *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 626 (1986) (opinion of Stevens, J.), *quoting Motor Vehicle Mfrs. Ass'n* at 43.

Even if one assumes *arguendo* that the agency's abuse policy might help ease its budget problems, the agency cannot, simply in order to save money, adopt a policy contrary to its basic duties, any more than it could save money by refusing to pay out guaranteed benefits when due. A policy designed to discourage employers' provision of non-guaranteed benefits is contrary to the entire scheme of benefit insurance, and contrary to the claims against employers established by Congress in designing ERISA.

Moreover, in successive amendments to ERISA, Congress has addressed the possibility of abusive shifting of plan liabilities by tightening termination criteria, a remedy that is consistent with the basic purposes of the statute.[18] Prior to 1986, an employer could terminate a plan regardless of whether the plan had assets sufficient to pay all PBGC guaranteed benefits and whether or not the employer could afford to continue the plan. The employer determined in its sole discretion when a termination would occur, thereby controlling

18. The Brief of the Solicitor General fails to acknowledge that the statutory scheme in effect when the PBGC involuntarily terminated the LTV plans is not the one that exists today. Since termination of the LTV plans, ERISA has been substantially amended specifically to address the concerns that the PBGC claims motivated its "abuse" policy. *See infra* at 28-30; Opp. to Cert. Pet. at 12-13.

the incidence of any claim against it by the insurance program and by beneficiaries against the insurance program and, to some extent, the amount of such claim. H.R. Rep. No. 241, part 2, 99th Cong., 2d Sess. at 32, 41, *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 689, 699 (hereinafter "House Report"); *see In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 651 (2d Cir. 1983).

Congress identified two types of resulting abuses: profitable employers with low net worth terminated their plans either to transfer their unfunded pension liabilities to the PBGC, or to evade responsibility for paying benefits not guaranteed by the PBGC. House Report at 41-42, *reprinted in* 1986 U.S. Code Cong. & Admin. News at 699-700; *see also* "Findings and Declaration of Policy," 29 U.S.C. § 1001b(a)(4) (Supp. IV 1986). These abuses did not result from PBGC involuntary terminations, which cannot be controlled by an employer. The PBGC institutes involuntary proceedings, as it did here, only after it determines that a plan has not met minimum funding standards, that a plan is unable to pay benefits when due, or that "the possible long-run loss of the [PBGC] with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a)(4). Nor did the abuses result from the legal restrictions imposed on a Chapter 11 debtor.

Congress addressed perceived abuses of the voluntary termination provisions by revising the termination standards. Under SEPPAA an employer could proceed by way of a "standard termination" only if a plan contained sufficient assets to pay not only guaranteed but also certain non-guaranteed benefits. 29 U.S.C. §§ 1301(a)(16), 1341(b) (Supp. IV 1986). Otherwise, an employer would have had to meet the stringent conditions for a "distress termination." Under the PPA these conditions were made even more stringent, requiring that the employer be in reorganization proceedings, that the bankruptcy court approve the termination, and that termination be necessary to permit the employer to continue in business. 29 U.S.C. § 1341(c)(2)(B) (West Supp. 1988).

Congress has also considered, and rejected, a PBGC proposal to ban follow-on plans. Throughout 1987 Congress considered various amendments to ERISA in relation to termination liability with the understanding, as noted in a House Ways and Means Committee's report, that "[u]nder present law" an employer, following a voluntary plan termination, "may continue or attempt to establish a plan that provides retirement benefits to employees," including a plan "designed to provide the same benefits as the terminated plan" less PBGC benefits. H.R. Rep. No. 391(II), 100th Cong., 1st Sess., 1010, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-378, 2313-627 (hereinafter "Ways & Means Report"). Two proposals were made to change the *status quo*. The "Administration's Proposal on the Funding and Termination of Defined Benefit Pension Plans," endorsed by the PBGC, contained a provision in the termination section that prohibited "plan reestablishments" for five years after termination of an underfunded plan. Pet. App. 97a n.28. The House Ways and Means Committee proposed a five-year prohibition on the establishment of "replacement plans" following a voluntary distress termination. Ways and Means Report at pp. 1011-12, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-628-629. However, the three other Congressional committees which passed related legislation declined to adopt any similar provisions. While the bill that passed the House contained the five year prohibition, the Conference Committee which developed the finally enacted bill determined not to adopt it. H. Conf. Rep. No. 495, 100th Cong., 1st Sess., 881-885, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1245, 2313-1627-1631. The PPA therefore contains no limitations on new benefit plans adopted after a plan termination.

This explanation of the legislative history of and subsequent amendments to ERISA merely supports the conclusion, compelled by the plain language of Section 4047, that the agency cannot use

restoration to enforce a policy that is flatly contrary to its duties under ERISA.[19]

The agency cannot salvage its fundamentally invalid "abuse" policy by complaining about the Court of Appeals' use of legislative history. PBGC Br. at 24-25; U.S. Br. at 19-20. Before that court the agency characterized follow-on plans as "patently at odds with the legislative purpose" of the agency. PBGC Brief before Court of Appeals at 8. The court correctly examined the agency's

19. In this section, respondents assume *arguendo* that the agency has an ascertainable abuse policy that was applied in the LTV restoration decision. In fact, however, the agency's "policy" remains quite obscure. To describe what actions are condemned by its policy, the agency continues to point to three opinion letters, concededly "not binding on the public or the courts," PBGC Opinion Letter No. 87-7, July 21, 1987, describing situations that bear no resemblance to the situation of LTV. *See infra* at 35-36. At the same time, the agency has endorsed the payment of full non-guaranteed benefits by an employer following termination, *Heppenstall*; *see supra* at 24, and has conceded that it has no objection to the establishment of post-termination plans based on post-termination service. PBGC Brief at 7 n.8. An employer who paid in full all non-guaranteed benefits to which its employees were entitled based on their service up to the moment of termination, and initiated a new plan based on all service since termination, would have eliminated the hardship of termination for its employees far more completely than has LTV in this case. *See supra* at 8 (describing numerous differences between terminated plans and CBA plans).

The PBGC has conceded that provision of 75% of non-guaranteed benefits would not violate its policy since the section 4049 trustee was charged with collection and distribution of up to 75% of non-guaranteed benefits. 29 U.S.C. § 1349 (Supp. IV 1986). The interim labor agreement calls for payment of an average of 92% of the non-guaranteed benefits for retirees. The difference in this multi-billion dollar case between the 75% and the average 92% non-guaranteed benefit payment is approximately $6 million annually. A strike of only two days duration would cost LTV and its creditors, including the PBGC, more. Thus, just as it was prior to restoration, *see* JA 256-257, LTV remains unable to discern what the PBGC's abuse policy actually is.

enabling statute and its legislative history to conclude that the agency's claim was baseless, and that "there [is] no indication that the establishment of follow-on [plans] is impermissible" under ERISA. Pet. App. 19a. In this analysis, the court was permitted to note the subsequent legislative history that confirms the conclusion compelled by the plain meaning of the statute. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) ("[a]lthough subsequent legislative history is not dispositive," it supported the Court's interpretation of provision at issue); *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982) ("subsequent legislative history" of statutory provision confirmed that Treasury Department regulation at issue was not a reasonable statutory interpretation).

C. Alleged Abuse Is Logically Irrelevant to the Restoration Decision Since Financial Affordability is Determinative

A company whose finances have improved sufficiently to afford a previously terminated plan should have that plan restored to it. *See, e.g.*, Joint Explanatory Statement of the Committee of Conference, H. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5158 ("a terminated plan . . . may be restored if, during the period of its operation by the trustee, experience gains or increased funding make it sufficiently solvent"); 29 U.S.C. § 1001b(c)(4) (Supp. IV 1986) ("It is hereby declared to be the policy of this title . . . to provide for the transfer of unfunded pension liabilities onto the single employer pension plan termination insurance system only in cases of severe hardship"). LTV has never disputed this proposition.

Conversely, an entity that cannot afford a previously terminated plan cannot have that plan restored to it. To "restore" a plan to an entity that cannot afford it would be a meaningless exercise leading to immediate re-termination. The agency concedes this. It now admits that it did not restore the Republic Retirement Plan — which the agency has never suggested differs in any other way from the three restored plans — because "that Plan did not have enough

money to pay benefits currently due."[20] To permit restoration as a remedy for "abuse" of PBGC policy in instances where a plan must be promptly reterminated would sanction manipulation of the process for the sole purpose of increasing PBGC claims within the bankruptcy to the detriment of all other creditors.[21] PBGC Br. at 37 n.23; *see* U.S. Br. at 24 n.19.

ERISA thus makes financial improvement both a necessary and a sufficient condition for restoration. The agency's asserted abuse policy, even if it could be squared with ERISA and other federal laws, is logically irrelevant to the restoration decision. An agency decision based on a logically irrelevant factor cannot stand: "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *see Overton Park*, 401 U.S. at 416-17.

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20. As noted, see *supra* at 10 n.5, ERISA might well prevent restoration of the three plans now at issue because their assets may have been exhausted since their terminations. LTV has not been advised by the PBGC of the current status of their assets, but benefits have been paid at approximately $26 million per month since January 1987 with no assets being added. LTV estimates that the assets of the J&L Hourly Plan, the largest, were exhausted in December, 1989.

21. In this case, the PBGC's claim in the event of retermination would increase from approximately $2 billion to more than $3 billion as a result of the change in termination date and the 1987 ERISA amendments giving the PBGC a claim for 100% of the unfunded liability. 29 U.S.C. § 1362(b)(7)(A) (West Supp. 1988).

The arbitrary result of basing a determination on abuse is demonstrated by the Solicitor General's rationalization, never advanced by the PBGC, of a sliding scale under which entities with an identical ability to afford plans would be treated differently based on whether one of the entities had adopted a "follow-on plan." U.S. Br. at 24-25. Yet under the statutory scheme, a plan can remain terminated only if a sponsor cannot afford the plan. To use the continuation of terminated status as a reward to an entity that *can* afford its plan is fundamentally contrary to the agency's duty to terminate plans only where necessary. The sliding scale proposition also lays bare the manipulative objective of this restoration notice, and precludes the articulation of a reviewable, rational standard for assessing financial improvement. Such a *post hoc* rationalization demonstrates how arbitrary and imprudent is the agency's version of "abusive" follow-on benefits.

In the present case, the lack of any logical connection between "abusive follow-on plans" and restoration is particularly evident. The interim agreement specifically provided that it would be extinguished, and the parties would return to the bargaining table, if the new programs were struck down. JA 155. LTV had agreed to litigation of the PBGC's appeal from the order approving the labor contract, or to the commencement of a declaratory judgment action, to determine the legality of the CBA benefits. JA 360-361. The PBGC thus had full access to the courts for review and, if appropriate, enforcement of its policy, with the agreement itself promising the most complete form of enforcement. Punitive restoration on this ground was unnecessary and irrational. As a matter of law, the restoration notice based on "abuse" was arbitrary and capricious and the lower courts' judgment on that point should be affirmed.

D. The Agency's Application of its "Abuse" Policy to the Interim Benefits Was Arbitrary and Capricious

The District Court and the Court of Appeals both held that even if the agency's "abuse" policy was within its statutory authority, its application of that policy to the interim benefits was arbitrary and capricious. Pet. App. 17a, 100a. Both the District Court and the Court of Appeals found that the administrative record provided no support for the conclusion that the interim benefits constituted "follow-on" plans.

The agency's failure even to consider the federal policies that led to the interim benefits was coupled with a failure to consider adequately whether the interim benefits even were "follow-on" plans. "Nowhere in the record," the Court of Appeals held, "is there a showing that the PBGC undertook an analysis" of the following differences between the CBA Plans and the terminated plans:

> "(1) none of the new programs under the 1987 CBA Plans are guaranteed by PBGC; (2) benefits under the new Plans are provided through welfare plans, insurance companies or general corporate assets, whereas benefits under the old Plans were provided under a single defined benefit plan; (3) the 1987 CBA Plans have more restrictive age and service eligibility requirements; and (4) the length of service does not necessarily increase the amount of some benefits under the new Plans." Pet. App. 19a.

Both courts also correctly held that the three PBGC opinion letters which the agency put forward to explain why the CBA plans were abusive "follow-on" plans "concerned cases that were 'too factually dissimilar from the instant case to be of substantial assistance here.'" Pet. App. 20a. By its own admission, the agency's opinion letters "are not intended to dispose of particular controversies between private parties," and "are not binding on the public or the courts." PBGC Opinion Letter No. 87-7, July 21, 1987. The three letters put forward here involved cases of voluntary rather

than involuntary terminations. Moreover, in two of the cases employers had proposed a package which specifically contemplated that plan termination would be coupled with new plans that used PBGC funds as an integral part of their financing and resulted in benefits equal or greater than the pretermination level. Not only were the LTV plans terminated involuntarily by the PBGC, "there was no evidence that LTV contemplated the use of PBGC funds in the new Plans or entered into the 1987 CBA Plans in an attempt to assure its employees a high level of benefits while circumventing its obligation to fund the pension plans." Pet. App. 20a. On this ground, therefore, the restoration decision of the PBGC was arbitrary and capricious and the matter must be remanded even if, contrary to our arguments, follow-on arrangements could in some circumstances support restoration.

* * *

In sum, the agency's "abuse" rationale for restoration is baseless. Here, restoration conflicts with the substantial bankruptcy and labor law policies that led directly to the interim benefits. At a minimum, the blatant refusal of the agency to even consider these directly relevant statutory schemes was arbitrary and capricious. Even if the agency may look only to ERISA, its vague abuse policy is fundamentally at odds with that statute, is contrary to all evidence and in any case is logically irrelevant to restoration. Finally, even if one assumes that the agency can use restoration to punish "abusive follow-on plans", the agency failed even to adequately determine whether these were follow-on plans. On any one of these grounds alone, the "abuse" rationale must be rejected.

POINT II

The Agency's Determination of "Financial Improvement" was Arbitrary and Capricious

LTV has never disputed that financial improvement sufficient to afford pension obligations would justify restoration. *See* Pet. App. 21a. But the agency was required to consider in a rational manner

whether the financial condition of LTV Steel had improved enough that it could afford the Plans. In its analysis of this question, the PBGC was required to recognize the fact that LTV Steel is in bankruptcy, and that affordability in these circumstances must take into account LTV Steel's ability to reorganize and to provide equal treatment in a plan of reorganization to claims of equal status. If LTV Steel cannot meet the requirements of equality of treatment in a plan of reorganization, it will be liquidated. In that case, the plans will be reterminated. The PBGC ignored this reality.

The record plainly shows that the agency did not even *consider* the possibility that the Plans, if restored, would have to be reterminated; did not even *consider*, before declaring that LTV's finances had improved, the fact that LTV is in bankruptcy; articulated *no* reviewable standard of financial improvement; and based its financial improvement conclusion on the same data concerning financial conditions that it had used for its termination decision eight months before, and on "fundamental, yet unexplained and unexamined assumptions." Pet. App. 22a. The agency's financial improvement determination failed to meet the most minimal requirements of the "arbitrary and capricious" standard of review of informal adjudication.

A. Failure to Consider Possibility of Retermination

The lower courts examined whether the agency had given *any* consideration to the most obvious question arising from restoration: will it lead to immediate retermination? The agency had not and this failure alone required that the restoration notice be vacated:

> "*We note that nowhere in the administrative record is there any evidence that PBGC assessed the possibility that the Plans would have to be re-terminated.* ERISA contains no special provisions governing retermination; however, the standards would be the same as for an initial termination. If in the near future LTV were once again found unable to adequately fund the Plans, the resulting vacillation in agency policy would lead to uncertainties on the part of the retirees, plan sponsors,

creditors and the government. Such uncertainty is to be avoided where possible. *See New York Council, Ass'n of Civilian Technicians*, 757 F.2d at 508." Pet. App. 25a (emphasis supplied).

In making its restoration decision the agency was required to consider whether it would lead to retermination (or justify its *post hoc* assertions on appeal that such consideration is impossible). ERISA does not intend that pension plans be ping pong balls batted between termination and restoration depending on short term factors. Section 4047 authorizes restoration only when restoration is consistent with the PBGC's duties under Title IV. Under Section 4042(a)(4) the PBGC must involuntarily terminate "as soon as practicable" a plan which has insufficient assets to meet current obligations. 29 U.S.C. § 1342(a) (Supp. IV 1986). It would be senseless to interpret Section 4047 to allow restoration where it is plain that a plan will have insufficient assets to meet current obligations and therefore must be reterminated by the PBGC under ERISA § 4042.

B. Failure to Consider the Consequence of Bankruptcy

The PBGC's financial analysis ignored the fact that LTV Steel could not make contributions to restored pension plans where its contribution obligation arose as a result of pre-petition labor. The agency also ignored the fact that the five month accumulation of cash on which the agency relied in finding "financial improvement" was a result of the protections afforded by Chapter 11. Pet. App. 23a. The agency cannot ignore the *fact* of bankruptcy *and* rationally assess whether LTV Steel's finances have improved.

Contributions owed the plans as a result of benefits earned by pre-petition employment constitute pre-petition debts. *See, e.g., Trustees of the Amalgamated Ins. Fund* v. *McFarlin's, Inc.*, 789 F.2d 98 (2d Cir. 1986) (claim for withdrawal liability that matures post-petition is pre-petition in nature since consideration for liability is pre-petition services); *In re Great Northeastern Lumber & Millwork Corp.*, 64 B.R. 426 (Bankr. E.D. Pa. 1986); *In re Silver Wheel*

Freightlines, Inc., 57 B.R. 476 (Bankr. D. Ore. 1985); *Amalgamated Ins. Fund* v. *William B. Kessler, Inc.*, 55 B.R. 735 (S.D.N.Y. 1985).[22] Absent express congressional instruction or bankruptcy court authorization based on extraordinary circumstances, pre-petition claims may not be paid by a Chapter 11 debtor outside a plan of reorganization. Therefore, analysis of a Chapter 11 debtor's ability to make contributions to a pension plan must take into account not only the legal limitations upon such a debtor's ability to use apparently available assets, but also the debtor's obligation to pay on an equal basis all claims of equal status.[23] The PBGC, which has stated that it deliberately ignored

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22. The observation of the Court of Appeals that such contribution obligations give rise to pre-petition claims in this case, while correct, did not constitute a holding of the Court in the context of this case, and is not encompassed in the questions presented for review by this Court. Appropriate review of this issue — which would have an immense impact on every bankruptcy — would require actual litigation of the status of identified pension contribution claims, development of a full record, and consideration by lower courts before any review in this Court. In fact, this precise issue is now pending in the Bankruptcy Court.

23. The Solicitor General's brief once again conveys an inaccurate analysis of relevant law. U.S. Br. at 22 n.18. It is correct to observe that a guarantee of future benefits is considered compensation earned by a worker at the time the work is performed. Claims for such benefits based on service performed pre-petition are therefore pre-petition claims. The debtor's responsibility under ERISA to fund such benefits may arise after the petition is filed but that does not change the pre-petition nature of the debtor's obligation to its retirees. The Solicitor General confuses this point with the correct precept that the cost of benefits earned by work performed after the bankruptcy petition is filed is a current obligation, like wages.

Priorities are assigned under the Bankruptcy Code to compensation due as a result of labor performed either after the petition was filed or within 180 days prior to the filing. These priorities, which are designed to assist reorganization by ensuring employees that they will be fully compensated for their post-petition service, have no relevance to benefits based on pre-petition service. To obtain administrative status, a claim must meet a two part test. It must arise from a transaction with the debtor-in-possession and it must benefit the debtor-in-possession in the operation of its business. *See In re Jartran, Inc.*, 732 F.2d 584, 587 (7th Cir. 1984); *In re Mammoth*

applicable federal law other than ERISA when reaching its restoration decision, refused to consider the fact, which it had already found, JA 129, that LTV Steel could not fund the pension plans and a plan of reorganization. This implicit recognition that LTV Steel cannot therefore afford the pension plans leaves the PBGC's determination without statutory or factual foundation.

The District Court observed that it "cannot analyze" whether the agency's financial improvement conclusion "is consistent with ERISA since the PBGC has never addressed, formally or informally, the question of what percentage of a Chapter 11 debtor's cash flow should be deemed adequate to fund the full cost of the debtor's minimum funding obligations." Pet. App. 116a n.38. It could not review the agency's analysis of LTV's financial condition because there was in essence nothing to review. Pet. App. 115a-116a. An administrative record so devoid of explanation that judicial review is impossible must be rejected as arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (court must examine agency explanation to determine whether it is based on relevant factors or shows a clear error of judgment).

Mart, Inc., 536 F.2d 950 (1st Cir. 1976); *Trustees of Amalgamated Ins. Fund*, 789 F.2d at 101; *In re Baths Int'l, Inc.*, 31 B.R. 143, 145 (S.D.N.Y. 1983). This test is premised upon two fundamental policies underlying federal bankruptcy law, equality of distribution and rehabilitation of the debtor's business. Claims for pension obligations based on pre-petition service meet neither test.

Here, no more than $12 million of the billions of dollars of unfunded pension benefits at issue are compensation for work performed after the petition was filed or within 180 days prior to filing.

C. Fundamental Gaps in Reasoning

Although these glaring gaps in the administrative record by themselves require a remand to the agency, the conclusion that the agency's "financial improvement" rationale was arbitrary and capricious was also based on additional instances in which the agency completely failed even to *consider* fundamental factors relating to LTV's supposed financial improvements. The agency assumed, without any explanation, that LTV would be able to obtain $600 million of funding waivers from the IRS when the IRS had previously denied LTV's waiver request for 1985 and had revoked its waiver for 1984. Pet. App. 115a. "The record discloses no reason to believe that the IRS, after having denied previous waiver requests, would grant such requests in 1987." Pet. App. 22a. Moreover, the agency assumed, without any explanation, that $50 million savings resulting from concessions in the interim agreement would be retained even though the entire reason for the Union's concessions would be eliminated if the Plans were restored. Pet. App. 22a-23a.[24]

In sum, the agency's "analysis" that LTV Steel's financial condition had improved such that it could afford the pension plans was

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24. The agency's *post hoc* explanations for its financial improvement determination, such as its belated shutdown analysis, are entitled to no deference by this Court. "*[P]ost hoc* rationalizations by counsel for agency action are entitled to little deference." *Securities Indus. Ass'n v. Board of Governors of Federal Reserve System*, 468 U.S. 137, 143 (1984); *see Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50; *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971); *Burlington Truck Lines, Inc.* 371 U.S. at 168-69.

Moreover, the reviewing court may not make up for deficiencies in the administrative record; "we may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Neither can *amici* substitute their financial analyses for that of the agency.

a shambles. The agency's financial improvement rationale is riddled with failures that *each* would require the restoration notice to be vacated: failure to consider the possibility of retermination; failure to consider the fact of bankruptcy; failure to explain the untenable assumptions on which its conclusion depends. The agency's finding of financial improvement was the definition of arbitrary and capricious action.

POINT III

The Lower Court's Discussion of PBGC Procedures Raises No Issue Under Vermont Yankee

The District Court and the Court of Appeals correctly found that the process by which the agency reached its results did not meet the minimum standards necessary to ensure a fair process amenable to review.[25] These findings do not contravene *Vermont Yankee*. That case forbids a court from imposing procedures on an agency beyond those required by the APA or the substantive statute in question. In this case, the APA is silent as to which procedures should be followed in informal adjudication, while ERISA prescribes no procedures applicable to restoration. This Court determined in *Overton Park*, 401 U.S. at 415, that the APA obliged courts in reviewing informal adjudication to engage in a "thorough, probing, in-depth review" of the record. This ruling survived and is consistent with *Vermont Yankee*. To assure a reviewable record, a court may

25. It is unclear that the discussion of PBGC procedures provided a separate basis for decision. At best, we can only guess that this may have been the case. As a result, this is a poor case in which to consider the "novel and important" issue of what procedures may be required in informal adjudication. U.S. Br. at 28 n.25. Affirming a remand to the agency would afford an immediate opportunity to cure the defects in the record, and in all likelihood would ultimately avoid the necessity to confront the issue in this case.

properly call for minimal standards of fair procedure.

The APA was enacted against the backdrop of the common law of informal adjudication, and does not displace it in the absence of an expressly articulated intent to do so. *See Jones* v. *General Motors Corp.*, 856 F.2d 22, 24-25 (4th Cir. 1988) (noting "the principle of interpreting the statute so as to limit the scope of displacement of the common law".)

The common law of informal adjudication has long recognized that courts need to require that certain procedures be followed in order to ensure a record that permits judicial review. In *Overton Park*, for instance, this Court required that the Secretary of Transportation provide a reasoned explanation of his decision, despite the fact that neither the APA nor the statute in question required any type of findings and conclusions. 401 U.S at 420-421. The purpose of such a requirement was to ensure the possibility of "effective judicial review." *Id.* at 420. *See also Dunlop* v. *Bachowski*, 421 U.S. 560, 571 (1975) (Secretary of Labor must provide court and complaining witnesses copies of statement of reasons for not prosecuting action under Labor-Management Reporting and Disclosure Act "to enable the reviewing court intelligently to review the Secretary's determination"); *Independent U.S. Tankers Owners Comm.* v. *Lewis*, 690 F.2d 908, 923 (D.C. Cir. 1982) (requiring notice, comment, and statement of reasons as "necessary means" for conducting review).

The common law of informal adjudication also recognized that certain measures were fundamental to fair process. Informal adjudication reflects a "residual category of procedural entitlement," Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739, 739 n.1 (1976); as such, it represents a non-Constitutional source of authority for imposing certain procedures. This Court has implicitly recognized this fact. In *Bowman Transp.*, at issue was the grant to motor carriers of certificates of public convenience allowing them to transport goods over certain routes. Applicants' interest in such certificates clearly was not a constitutionally protected one, for none could claim to have a "legitimate

claim of entitlement" to a certificate. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Nonetheless, in rejecting a challenge to the procedures employed by the agency in issuing the certificates, the Court noted, "A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it." *Bowman*, 419 U.S. at 288 n.4.[26] *See also Chicago, Milwaukee, St. Paul and Pacific R.R. Co.* v. *United States*, 585 F.2d 254, 260 (7th Cir. 1978) (post-*Vermont Yankee* case involving no property or liberty interest; court found inadequate notice and opportunity for comment, remanding because "fundamental fairness in administrative proceedings requires notice clearly informing a party of the proposed action and the basis for that action.")[27]

The findings of the District Court and the Court of Appeals were compelled not only by the common law of informal adjudication but also by the courts' statutory obligations, under § 706(2)(A) of the Administrative Procedure Act, to engage in a "thorough, probing, in-depth review" of the record. *Overton Park*, 401 U.S. at

26. The Court goes on in the next sentence of its opinion to discuss instances in which the Due Process Clause also restricts an agency's use of evidence, which may be why the United States in its brief erroneously described *Bowman* as a "due process case." U.S. Br. at 27 n.24. As the discussion in text establishes, that case involved no protected liberty or property interest. If it did, this one does, too. LTV's interest, and that of its creditors, in avoiding government imposition of significant financial liability is at least as weighty an interest as a hope that one might obtain a certificate to do business over a certain route.

27. The common law of informal adjudication also reflects a relative consensus on the procedures necessary to ensure basic fairness. As one commentator has observed, "It would be difficult to imagine even a streamlined adversary system that did not provide an individual with notice, an opportunity to comment, and a statement of reasons before adverse action is taken." Verkuil, 43 U. Chi. L. Rev. at 749. Such widespread agreement serves to cabin judicial discretion.

415. In order to fulfill this obligation, the court was authorized to ensure the existence of a record adequate to permit judicial review of the agency's decision. *Overton Park*, 401 U.S. at 420-421; *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973). *Cf.* Scalia, Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345, 354 (noting "two bases of decision which conceptually may be quite distinct: (1) the inadequacy of the agency's procedures; and (2) the inadequacy of the record to support the agency decision"). Here, the agency had "fail[ed] to develop a complete, reviewable record," Pet. App. 123a.

A court exploring an agency's failure to create an adequate record acts reasonably, and indeed responsibly, when it examines the procedural defects that contributed to this failure. As the court said in *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 339 (D.C. Cir. 1989), "[A] district court that remanded a matter for further proceedings without indicating any connection it perceived between an unacceptably opaque agency decision and the procedures from which it arose would, by its silence, disserve every relevant interest, and advance none."[28]

In this case, the lower courts simply set forth suggestions about how an adequate record might be created and basic fair process

28. A court engaged in this task establishes a "performance standard" — that "the agency must produce an administrative record that delineates the path by which it reached its decision" — rather than a "design standard" — that there are "specific procedural steps that must be followed in order to create a reviewable record[.]" *Id.* at 338. Only the latter may implicate this Court's decision in *Vermont Yankee*. *See generally Occidental*, 873 F.2d at 337-339 (reconciling *Vermont Yankee* with *Overton Park*); *see also East Texas Motor Freight Lines* v. *United States*, 593 F.2d 691, 695 n.7 (5th Cir. 1979) (finding that *Vermont Yankee* does not prevent remand for explanation necessary to preserve effective judicial review); S. Breyer, *Regulation and its Reform*, 105-106 (1982) (discussing performance versus design standards).

assured. A statement that identified the standards used by the agency and indicated how they had been applied to the facts of this case would have enabled the court to determine if the agency had acted in a reasoned manner. This is particularly important in light of the fact that the agency restored some but not all of LTV Steel's pension plans. As the District Court noted, "in the absence of ascertainable standards concerning follow-on plans," the agency's distinction among plans is "difficult to understand[.]" Pet. App. 125a n.44. Similarly, the provision of some type of notice of reasons would have provided evidence of rational decision-making by forcing the PBGC to articulate its standards and the way in which they were being applied. Finally, an opportunity to respond would have assured the court that all relevant factors had been put before and considered by the agency. At the same time, the agency was not directed by the court's brief discussion to utilize any specific procedures on remand.

The PBGC makes much of a series of meetings surrounding LTV's application to the Bankruptcy Court for approval of the interim agreement and of correspondence with LTV thereafter, suggesting that these communications were adequate to ensure administrative fairness. Yet the agency does not contest that in its discussions with LTV it never identified financial condition as a factor in its decision, much less set forth the analysis that underlay reliance upon that factor. At no time prior to restoration did the PBGC take the basic step of expressly informing LTV that it proposed to restore LTV Steel's pension obligations pursuant to specific standards that it deemed satisfied in this case. Under such circumstances, the agency's open-ended solicitation of "any additional information [that LTV] might wish to supply," JA 348, hardly afforded LTV the opportunity to respond directly to the PBGC's position that the contemplated action could be based on financial improvement.

In short, the first time that LTV was aware that the PBGC claimed financial improvement justified restoration was when it was informed that restoration had occurred. The agency now claims that

LTV should have been able to piece together its rationale from various communications. Widely accepted notions of fairness demand more, particularly when the business plan before the agency was the same one on which the termination decision was based a few months earlier. LTV was entitled to notice of the asserted improvement of its financial condition.

The APA was not intended to bestow unfettered discretion on agencies. As this Court said in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644 (1950):

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights."

The minimal procedures suggested by the court in this case are thus consistent with the basic principles underlying our system of administrative justice.

CONCLUSION

The decision of the Court of Appeals should be affirmed and the PBGC's notice of restoration should remain vacated.

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Respectfully submitted,

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